United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7134

ORIGINAL
WITH PROOF
OF SERVICE

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

P/S

CLIFFORD J. LEWIS, JR.,

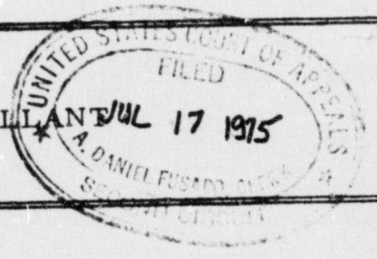
Plaintiff-Appellant,

-against-

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLIAM WIRTZ, as Trustees in Reorganization of the Properties of PENN CENTRAL TRANSPORTATION COMPANY, Debtor in Reorganization,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF OF PLAINTIFF-APPELLANT

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I N D E X

TABLE OF AUTHORITIES

Cases:

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BRIEF OF PLAINTIFF-APPELLANT

This is an appeal by the plaintiff-appellant (LEWIS) from a judgment in favor of the defendant-appellee (PENN CENTRAL) entered in this action on February 3, 1975. The action was tried before the Honorable Richard H. Levet and a jury on January 2, 1975 et seq. On January 10, 1975 the jury rendered a verdict in favor of PENN CENTRAL upon which the judgment was entered. LEWIS filed a notice of appeal from the judgment on February 18, 1975.

THE FACTS

This is an action under the Federal Employers Liability Act and the Federal Safety Appliance Act by plaintiff against his employer, PENN CENTRAL, for damages for personal injuries sustained by him on October 26, 1969 in the course of his employment as a freight brakeman in the Penn Central freight railroad yard in Morrisville, Pennsylvania.

Plaintiff testified that he had qualified as a freight brakeman and had been employed as a car dropper for six months (A-29 - A-30). He explained that a car dropper moves freight cars in a railroad yard by riding them down a slope while applying the brake manually (A-30 - A-32).

Immediately before the accident, he climbed on the lead car of two box-cars, stationed himself on the rear brake platform of that car, applied the brakes to test them and they held (A-33 - A-35). Upon his signal, another employee of the railroad released the two box-cars by a lever device at the top of a hill from the rest of the train (A-35), at which time the two box-cars started to roll down the hill. Plaintiff started to turn the vertical wheel brake so that it would slow down as it descended and would ease into the train with which it was to

have coupled on a track at a point beyond the bottom of the hill (A-36 - A-37). The cars did not slow down but picked up speed (A-37), plaintiff checked the brakes, found they were not holding (A-39) and attempting to avoid injury leaped from the side ladder of the box-car some distance to the ground, the recognized procedure in such emergencies (A-40 - A-41). He sustained serious injuries which are the subject of this suit.

It is the contention of the plaintiff that his employer violated the Federal Employers Liability Act in failing to provide him with proper and sufficient equipment and violated the Federal Safety Appliance Act requiring the freight cars to be equipped with "efficient hand brakes."

POINT I

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE DEFENDANT'S REPORTS OF THE ACCIDENT OFFERED BY IT UNDER THE FEDERAL BUSINESS RECORDS ACT.

The plaintiff never knew the number of the car he rode down involved in the accident (A-138). It was stipulated that there were no witnesses to the accident (A-49). Critical to this case was the condition of the brakes.

Upon the defendant's case, Frank Talbott, a trainmaster,

testified that a "personal injury report" (Exhibit H) had been made dealing with this accident (A-81 - A-82). He testified that he never spoke with the plaintiff (A-83), that the information in the report was provided by William F. Campbell, the night trainmaster (A-84), that when he (Talbott) signed the report he accepted the version of the accident on the paper prepared by Campbell without any independent inspection of the car, verification of the cars or conversation with the plaintiff (A-85). Over objection of plaintiff's counsel, the report was admitted into evidence (A-86). Campbell did not testify.

Exhibit H purports to identify the car involved in the accident, the car number and circumstances of the accident (A-90).

On cross-examination, Talbott conceded that his only knowledge of the car was from the report (A-91), that he never went down to the track where the accident is alleged to have taken place (A-92) nor ever checked the facts himself (A-93).

The defendant also adduced testimony on its case from David W. Halderman, an assistant general foreman for the defendant, identifying an alleged inspection report made by W.F. Campbell, assistant trainmaster and Alfred Zuchero, gang foreman (A-106 - A-107) with respect to the accident. Halderman

testified Zuchero was dead and Campbell was employed by a railroad somewhere in Virginia.

On cross-examination, Halderman testified that the report allegedly relates to a particular car which he never saw (A-108) and that he has no knowledge as to the car and accident except that which he read from the report (A-109). He said he did not know how many cars were in the freight yard at the time of the accident nor the time of the alleged inspection (A-109) but that there were about 45 tracks in the yard (A-110). He also testified that he would have no way of knowing whether they inspected the car that was involved in the accident (A-111) and it is possible that the men never looked at the car (A-111). Over objection of plaintiff's counsel, the report was received in evidence as Exhibit I (A-112).

Were Exhibits H and I properly admitted under the Federal Business Records Act, 28 USC Section 1732 (prior to 1948 revision, 28 USC 695)?

Under the authority of PALMER v. HOFFMAN (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.ed. 645, 144 ALR 719, it was error to admit either of the reports. In the PALMER case on appeal from this court, the Supreme Court held that the statement of an

engineer (now deceased) of a train involved in an accident made shortly after the occurrence and during a regular and usual investigation was properly excluded.

In delivering the opinion, Mr. Justice Douglas stated:

> "We may assume that if the statement was made 'in the regular course' of business, it would satisfy the other provisions of the Act. But we do not think that it was made 'in the regular course' of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule-restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous. 5 Wigmore, Evidence (3d ed. 1940) §1530. It was the problem which started the movement towards adoption of legislation embodying the principles of the present Act. See Morgan et al, The Law of Evidence, Some Proposals for its Reform (1927) c. V. and the legislative history of the Act indicates the same purpose.
>
> "The engineer's statement which was held inadmissible in this case falls into quite a different category. It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by negligence of its employees. But that fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the profession. We would then have a real perversion of a rule designed to facilitate admission of records which experience has

shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operation of a business would be forgotten as the basis of the rule. See Conner v. Seattle, R & S Ry. Co., 56 Wash 310, 312-313, 105 P 634. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (Chesapeake & Delaware Canal Co. v. United States, 250 US 123, 128-129) acquired from thei source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a 'regular course' of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight, not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

"In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

"It is, of course, not for us to take these reports out of the Act if Congress has put them in. But there is nothing in the background of the law on which this Act was built or in its legislative history which suggests for a moment that the business of preparing cases for trial should be included. In this connection it should be noted that the Act of May 6, 1910, 36 Stat 350, 45 USC §38, requires officers of common carriers by rail to make under oath monthly reports of railroad accidents

to the Interstate Commerce Commission, setting forth the nature and causes of the accidents and the circumstances connected therewith. And the same Act (45 USC §40) gives the Commission authority to investigate and to make reports upon such accidents. It is provided, however, that 'Neither the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.' 45 USC §41. A similar provision (36 Stat 916, 54 Stat 148, 45 USC §33) bars the use in litigation of reports concerning accidents resulting from the failure of a locomotive boiler or its appurtenances. 45 USC §§32,33. That legislation reveals an explicit Congressional policy to rule out reports of accidents which certainly have as great a claim to objectivity as the statement sought to be admitted in the present case. We can hardly suppose that Congress modified or qualified by implication these long standing statutes when it permitted records made 'in the regular course' of business to be introduced. Nor can we assume that Congress having expressly prohibited the use of the company's reports on its accidents impliedly altered that policy when it came to reports by its employees to their superiors. The inference is wholly the other way.

"The several hundred years of history behind the Act (Wigmore, supra, §§1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But 'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

POINT II

THE COURT ERRED IN ITS CHARGE TO THE JURY AS TO THE CONDITION OF THE BRAKES BEFORE AND AFTER THE ACCIDENT.

Court correctly charged: "If you find there was failure of the hand brake owing to unexplained reasons as

distinguished from a known or unexplainable particular defective condition, then it is not material that the hand brake performed properly at another time." However, this charge was rendered meaningless by the further instructions of the Court that there was evidence that the brake was inspected after the accident and no defect was discovered, that evidence of the existence of a particular condition at an earlier time raises a presumption that the condition continued without change and that evidence of a condition subsequent to the accident supports an inference of the earlier existence of that same condition (A-143 - A-144).

The Court committed reversible error in charging that if the brakes operated properly before the accident that "you may presume that the functioning would have continued...at the time of plaintiff's accident" (A-144). Further error was made in charging that if the brake was found to be functioning normally and properly when it was inspected later "...then you may infer or conclude...it would have operated normally and properly at the time of the accident and, therefore, was not defective."

Despite exception taken by plaintiff's counsel (A-150 - A-151), the Court refused to correct this charge (A-154 - A-155).

In MYERS v. READING COMPANY, 331 U.S. 477 at 483, an

action under the Federal Employers Liability Act and Federal Safety Appliance Act arising out of a failure of hand brakes on a railroad freight car, the Supreme Court, quoting Mr. Chief Justice Hughes' decision in BRADY v. TERMINAL R., 303 U.S. 10, stated:

> "When a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question."

POINT III

THE COURT ERRED IN ITS CHARGE TO THE JURY AS TO THE EFFECT OF PLAINTIFF'S UNSWORN RESPONSE TO A QUESTION IN HIS EMPLOYMENT APPLICATION.

The Court charged (A-146):

> "Plaintiff admitted that at the time of his application for employment with the railroad, - I will mention this later - he did not answer truthfully certain of the questions posed to him. Specifically, he answered no to questions which would have revealed that he had been hospitalized for a nervous breakdown or mental condition in 1964. No matter what other effect it may have, if any, this untruthful statement may be considered by you in your determination of the plaintiff's credibility on other testimony which he has given."

It was improper to charge the jury that an isolated unsworn response in the employment application of the plaintiff may be considered by the jury on the issue of his credibility.

CONCLUSION

The verdict in favor of the defendant should be set aside and a new trial ordered.

Respectfully submitted,

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Received 2 copies of the within
Brief for Plaintiff appellant
this 17 day of July, 1975.

Sign Robert M. Peet by Henry W. Herbert

For: Robert M. Peet Esq(s).

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